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SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PINA

FARMERS INVESTMENT COMPANY,
a corporation,

Plaintiff,

v.

THE ANACONDA COMPANY,
et al.,

Defendants.

NO. 116542

DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT
RE COMMERCIAL LEASE NO. 906

AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION
FOR PARTIAL SUMMARY JUDGMENT

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION
FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION
TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

FARMERS INVESTMENT COMPANY,
a corporation,

Plaintiff,

v.

THE ANACONDA COMPANY, et al.,

Defendants.

THE CITY OF TUCSON, a
municipal corporation,

Plaintiff in
Intervention,

v.

FARMERS INVESTMENT COMPANY,
a corporation, et al.,

Defendants in
Intervention.

ANDREW L. BETTMY, as State
Land Commissioner and THE STATE
LAND DEPARTMENT, a department
of the State of Arizona,

Defendants and
Cross-Claimants.

NO. 116542

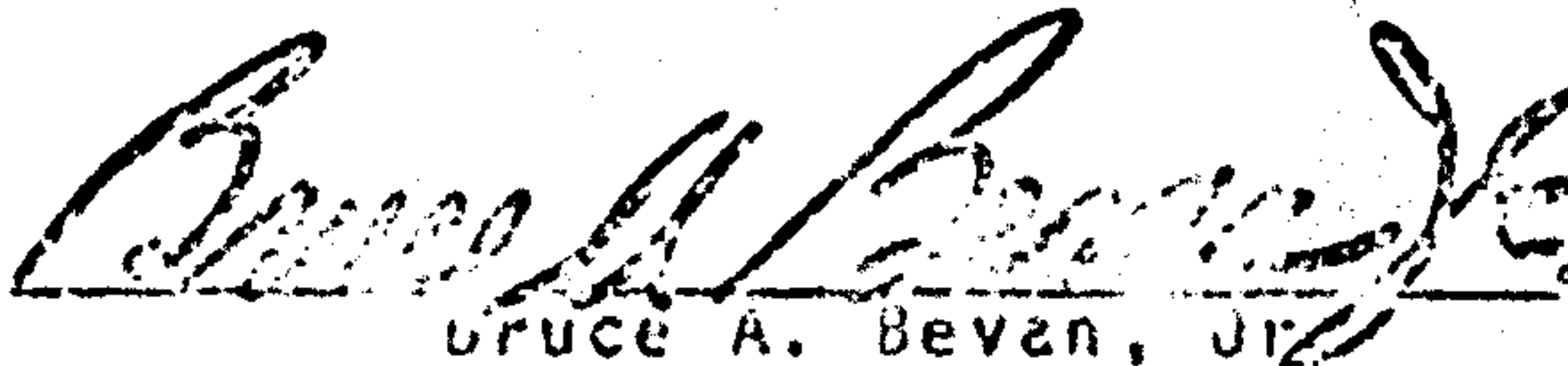
DEFENDANT'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
RE COMMERCIAL LEASE

NO. 906

Defendant Pima Mining Company ("Pima") moves the Court for
an order granting a summary judgment in favor of Pima and against
plaintiff on Count 4 of plaintiff's Amended Complaint.

1 The ground of this motion is that there are valid
2 defenses to said Count as to which there are no triable issues of
3 fact. This Motion will be based upon this Motion, the Affidavits
4 and Memorandum annexed hereto and upon all the records and files
5 of this action.

6 VERITY & SMITH
7 and
8 MUSICK, PEELER & GARRETT

9 By: 

10 Bruce A. Bevan, Jr.
11 Attorneys for Defendant
12 Pima Mining Company

1 PIMA MINING COMPANY'S MEMORANDUM

2 RE SUMMARY JUDGMENT MOTIONS

3
4 In Count Four of the Amended Complaint, plaintiff alleges
5 that a lease from the State to Pima in fact is an illegal "sale"
6 of land. We believe this non sequitur can and should be disposed
7 of now rather than to have the lengthy and complex enough trial
8 confused by spurious issues.

9
10 If by some rather inconceivable circumstance, this Court
11 should determine that the instant lease constitutes a sale of
12 mineralized land, there then are further triable issues of fact
13 before plaintiff can prevail, all as set forth in part 4 of this
14 Memorandum.

15
16 A R G U M E N T

17
18 1. No Land Has Been Sold.

19 Plaintiff cites various laws to the effect that certain
20 State land may not be sold. Besides plaintiff's interesting argu-
21 ments, the only fact set forth to support its claim that an illegal
22 sale has occurred is the existence of the instant lease. That
23 lease clearly provides for return of possession of the land to the
24 State on October 23, 1976. Thus, if the law recognizes any dis-
25 tinction between a sale and a lease, then this is a lease, not a
26 sale of the instant land.

27
28 Plaintiff argues, however, that this is a "sale" because
29 the lease allows development therefrom and use of a fugacious
30 substance, water. Yet the very laws it cites expressly provide
31 that

32 "Nothing herein shall prevent

1 "1. The leasing of any of the lands . . .
2 for . . . commercial . . . purposes, for . . .
3 ten years or less . . .
4

5 "2. The leasing of any of said lands . . .
6 for mineral purposes . . . for . . . twenty
7 years or less . . ."

8 [Article X, Section 3, Constitution]
9

10 Thus, Arizona law expressly allows, despite its prohibi-
11 tion against sale, leases of such lands. Further, its mineral
12 leases expressly allow permanent removal of even non-fugacious
13 products such as metals, stone and timber [A.R.S. 27-235(B)(1)].
14 Therefore, plaintiff's argument that a lease allowing an exhaustion
15 of a valuable product is a sale is rebutted by the constitutional
16 and statutory scheme forbidding sale but allowing mineral removal
17 and sale. A.R.S. 27-231, et seq.
18

19 In short, if plaintiff's argument were sound, Arizona's
20 statutes allowing mineral leasing, extraction and shipment of
21 minerals are and have been highly illegal.
22

23 Plaintiff contends (page 12) there is considerable
24 similarity between the instant lease and an oil lease. Plaintiff
25 then cites certain California cases which plaintiff claims support
26 the contention that the instant lease is a sale of State land.
27

28 Plaintiff first cites Stone v. City of Los Angeles,
29 114 C.A. 192, 299 Pac. 838 apparently for the proposition quoted
30 therein that oil is part of the realty and therefore an oil lease
31 involves a sale of land [page 14, Memorandum]:
32

"In place, it is part of the realty . . .

* * *

Thus a sale of a part of the freehold . . .
is just as much a sale as though the city
should convey the oil in place . . ."

Whether or not plaintiff knows it, Stone v. City of
Los Angeles, a 1931 District Court of Appeal case, does not have
much legal vitality.

Callahan v. Martin, 3 Cal. 2d 110, 43 P. 2d 788 (1935),
a Supreme Court case, rejected that "oil in place theory." As
that Court pointed out, the right to drill for oil is a profit
a prendre, which although an estate in real property or a chattel
real, was and is "not real property." [3 C. 2d at p. 118; p. 15,
Memorandum] The Court further pointed out the distinction between
(i) real property (i.e., "things real") in California Civil Code
Section 14(2) and (ii) servitudes upon land per Sections 801 and
802 of the Civil Code. Among such servitudes in gross per Civil
Code Section 802 is the "right of taking water."

Thus, the right to take water from land is not the
taking of real property nor does such constitute the "sale" of
land or real property.

In Boone v. Kingsbury, 206 Cal. 148, 273 Pac. 797 (1928),
the California Supreme Court held that,

"the license or privilege or leasehold by
which the permittees are granted the right
to explore and mine for gas and oil does not
constitute a grant or sale of tide-lands in
the sense that those terms are used in the

1 prohibitory provisions of Article XV, Sec-
2 tion 3, state constitution." [Emphasis
3 added]

4
5 Finally, as pointed out by the Supreme Court in City of
6 Long Beach v. Marshall, 11 C. 2d 609. 621, 82 P. 2d 362 (1938):

7
8 "And it should be noted, finally, that the
9 conclusion reached in the Stone case to the
10 effect that an oil lease is an unlawful
11 transfer of tideland is contrary to the
12 holding by this Court in the later case of
13 Boone v. Kingsbury, supra, at page 184."

14
15 Therefore, although plaintiff does not seem to be aware
16 of it, its only authority for contending that an oil or water
17 lease constitutes a sale of land decisively has been overruled
18 and the law is expressly and exactly to the contrary.

19
20 2. There Has Been No Use of Any Mineral by Pima.

21 As pointed out in Campbell v. Flying v. Cattle Co.,
22 25 Ariz. 577, 220 Pac. 417 (1923), not all Arizona land is pre-
23 cluded from being sold. As the Court stated:

24
25 "All non-mineral lands, with certain excep-
26 tions, are subject to sale and . . . mineral
27 lands are not."

28
29 Thus, plaintiff must show that not only has the instant
30 land been sold but that it is "mineral" in character.

31
32 The State Land Department never has classified land as

1 being "mineral" merely because it contained underground water.
2 Numerous other Commercial leases for the production of water
3 exist. Many of these were to Bagdad Copper (represented by
4 Snell & Wilmer). Such classifications by the State Land Depart-
5 ment are pursuant to the power vested in it by A.R.S. 37-212
6 which requires classification of lands as, e.g., lands suitable
7 for commercial purposes or lands containing timber, stone or other
8 valuable products. These interpretations by the responsible
9 State agency must be given great weight. State v. Boyd, 60 Ariz.
10 388, 138 P. 2d 284 (1943).

11
12 More importantly, plaintiff denies in its moving papers
13 that the instant land is mineral in character. Plaintiff cites
14 the Enabling Act, the Constitution and certain Acts of the Legis-
15 lature, all of which preclude the "sale or contract for sale of
16 any timber or other natural product of such lands." [Emphasis
17 added]

18
19 The above quoted language constitutes the sole con-
20 stitutional prohibition against land sale pertinent to these
21 motions. Yet, at page 11 of its Memorandum, plaintiff judicially
22 admits, "Water is plainly not 'timber or other natural product'
23 of such land. . . ."

24
25 Consequently, plaintiff has destroyed its sole basis
26 for Count Four.

27
28 Since (i) all that Pima takes from the lands under
29 Commercial Lease 906 is water and (ii) water is not a "natural
30 product of such land" and (iii) the only legal prohibition relied
31 on by plaintiff is against sale of land with certain "natural
32 product," it necessarily follows that the instant lease of land

1 violates no law. Therefore, Count Four should be disposed of now
2 rather than be left dangling to confuse the less spurious issues
3 which remain to be tried in this case.
4

5 3. No "Waste" is Being Committed.

6 Implicit in plaintiff's Memorandum is the contention
7 that "waste" is being committed by the State for "selling" its
8 water so cheaply.
9

10 "Waste" is defined as an "unlawful" act. 93 C.J.S. 559.
11 Thus, anything authorized by the landlord hardly can be legal
12 waste and the State here expressly has authorized water production.
13

14 Perhaps, however, plaintiff and its counsel are not as
15 much concerned with the relationship between the State and Pima
16 as being violated as they perhaps may be by their concern for
17 the natural resources of the State.
18

19 Although no such concern was expressed by Snell & Wilmer
20 when similar commercial leases for water production purposes were
21 issued to Bagdad Copper, let us assume that these lawyers have
22 acquired new insight regarding law and morality.
23

24 Nevertheless, what they assert now on behalf of FICO
25 is that the State should cease its Lease 906 so that water there-
26 under can be captured more easily by and without cost to FICO.
27 FICO is unconcerned, however, with the fact that a cessation of
28 Commercial Lease 906 will cost the State not only direct revenues
29 from said Lease but also millions and millions of dollars of
30 royalties and taxes from Pima and similar millions of dollars of
31 benefit arising from workmen being given jobs, producing taxable
32 income and staying off welfare.

1 Thus is the State of Arizona accused of so wasting its
2 natural assets by one whose only standing to so allege consists
3 of its greedy claim that it should be allowed freely to drain
4 State water to raise pecans in a venture which has been able to
5 survive only on tax supported subsidies.

6
7 In any event, the State is not guilty of "wasting"
8 State assets when it allows production of water or oil since
9 these fugacious substances might be drained away by competitive,
10 adjacent neighbors, such as FICO. In Dabney-Johnston Oil Corp.
11 v. Walden, 4 C. 2d 637, 52 P. 2d 237 (1935) [pages 14-16, Memorandum]
12 that Court held, in a portion of the decision not quoted by
13 plaintiffs, that it is not waste for one co-tenant to drill for
14 oil without the consent of his co-tenants. As the Court stated
15 (4 C. 2d 655-656):

16
17 ". . . In view of the fact that no enjoyment
18 can be had of an estate in oil rights except
19 through removal of the oil and other substances,
20 it is held that it is not waste
21 for a cotenant to go upon the land and produce
22 oil... This principle, applicable to
23 minerals in general, is of special importance
24 in regard to fugacious substances, which
25 may be lost entirely through drilling operations
26 on other lands if the owners do not
27 diligently seek to reduce them to possession."

28
29 Therefore, it is somehow unseemly for FICO to bleat that
30 the State should deprive its citizens of water (and ultimately,
31 mining and tax) revenues and instead "conserve" its water adjacent
32 to FICO so that FICO can drain it without charge to FICO.

1 In short, if the State's instant Lease constitutes
2 "waste," then what FICO desires simply is "theft."

3
4 4. Further Issues for Plaintiff to Prove.

5 As indicated at the outset, to prevail on Count Four,
6 plaintiff must prove a number of matters. In addition to proving
7 such a "sale" of mineral land plaintiff must also prove that it
8 has valid standing to complain of the alleged illegality. Thus,
9 at page 3, item 6, plaintiff quietly alleges that its acreage is
10 contiguous to Lease 206 and that plaintiff "relies upon and
11 requires the use of ground water of the area for the irrigation
12 of its crops."

13
14 True, this does not quite allege that FICO wants and
15 could enjoy the free use and benefit of the water being pumped
16 from adjacent lands. Yet, before plaintiff can have standing to
17 complain of Pima's pumping, plaintiff must show damage. To show
18 damage, plaintiff must prove that Pima's pumping is depriving
19 plaintiff of water.

20
21 Pima has denied that its pumping deprives plaintiff of
22 water. The affidavit of Robert Fox served herein on July 22, 1971
23 demonstrates triable issues that (1) there is a fault severing
24 hydraulic continuity between Pima's and FICO's water supplies and
25 that (2) Pima's pumping and use of water is in a water basin
26 separate from FICO's. Additionally, Pima has raised against FICO
27 the defenses of laches and estoppel, on Count 4 as well as on the
28 other counts of the Amended Complaint. Hence, these issues
29 remain unsettled even if the instant lease were a "sale."

30
31 Pima does not wish to burden the Court now with elaborate
32 affidavits showing such triable issues, especially since FICO has

1 put forward absolutely no proof of its injury, i.e., that its
2 pumping is from the same water basin as is Pima's pumping.
3 However, if the Court is of the view that a further showing of
4 triable issues is necessary to defeat FICO's summary judgment
5 motion, Pima moves the Court for leave to present specific affi-
6 davits and other proof upon the subject.

7
8 5. Conclusion.

9 We hope the Court is as convinced as we that FICO, as
10 a matter of law, is not entitled to prevail on Count Four. We
11 further believe that it would be in the interests of a more orderly
12 trial to rule against FICO now and grant a partial summary judgment
13 to Pima on Count Four.

14
15 Respectfully submitted,

16 VERITY & SMITH
17 and
MUSICK, PEELER & GARRETT

18
19 By: 

Bruce A. Levan, Jr.

20 Attorneys for Defendant
21 Pima Mining Company
22
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AFFIDAVIT OF GEORGE A. KOMADINA

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.

GEORGE A. KOMADINA, first being duly sworn, deposes
and says:

1. He is the Vice-President and General Manager of the
defendant Pima Mining Company and as a result has knowledge of the
following facts.

2. Portions of the pit from which Pima mines its ore
have been leased from the State of Arizona subject to the payment
of royalties as a result of its mining activity thereon.

3. Pima Mining Company has paid the State of Arizona
mineral royalties as a result of its mining activity on said State
leases as follows:


<u>Year</u>	<u>Dollars</u>
1967	\$ 684,000
1968	787,000
1969	864,000
1970	1,568,000
1971	917,000
1972	<u>553,000</u>
	\$5,373,000
Annual Average	895,500

4. In addition to these royalties Pima pays income tax,
severance tax and sales taxes on these State leases

1 5. The water pumped from Pima wells numbers 6, 7, 8 and
2 9 which are on the lands leased from the State of Arizona pursuant
3 to commercial lease number 906 is necessarily used for the process-
4 ing of the ore mined from the Pima pit. This processing includes
5 the requirement that water be used to convey tailings away from
6 the mill. Said tailings are thus transported to Sections 9 and 10
7 Range 13 East, Township 17 South. These Sections are also leased
8 from the State of Arizona pursuant to commercial lease number
9 907-01 and 907-02.

10
11 6. Pima additionally leases from the State of Arizona
12 rights of way so that water may be transported to the mill area
13 and back to said tailing pond deposit area. Thus the State of
14 Arizona has leased to Pima in effect a complete system for produc-
15 tion of water, transportation of water to the mill area where the
16 ore from State leases is processed and for transportation of
17 tailings away from said mill via water to tailing ponds deposit
18 areas. Each aspect of this system is necessary for the mining
19 and milling of ore. Each of these elements also is essential to
20 the payment of royalties by Pima Mining Company to the State of
21 Arizona for the ore mined and milled upon State leases.

22
23 7. There is more water deposited on the lands used by
24 Pima for deposit of its tailings (commercial lease 907) than there
25 is water taken from the lands subject to commercial lease 906.
26 For example, in 1972, on said sections 9 and 10, there was
27 deposited 4,991,267,000 gallons of water; there was reclaimed
28 therefrom for further use in the processing of ore 1,256,934,000.
29 gallons of water; there thus remained on the lands covered by
30 commercial lease 907, 3,734,333 gallons of water. For 1972 the
31 gallonage of water pumped from commercial lease 906 was 3,163,842,
32 000.



GEORGE A. KONADIRA

STATE OF ARIZONA)

) ss

County of PIMA)

Subscribed and sworn to before me this 20th day of August 1973.

Angela M. Choke

Notary Public

My Commission Expires Sept. 26, 1974

